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No. 97-335

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HARLAN D. VANDER ZEE,

Petitioner,

v.

JANET RENO, STONE OAK NATIONAL BANK, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

STONE OAK NATIONAL BANK AND STONE OAK BANKSHARES, INC.'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. Did the Fifth Circuit correctly find that as a matter of law Plaintiff's oral contract of reemployment is unenforceable because it violates Texas' at-will employment doctrine and lacks consideration?

2. Did the trial court correctly dismiss Petitioner's common law civil conspiracy claim because he failed to produce evidence of an illegal act by either the Bank or any Federal officer?

3. Can this Court order any relief against the United States or any of its officials when they are no longer parties to this proceeding?

LIST OF PARTIES

The Petitioner is:

1. Harlan D. Vander Zee.

The Respondents are:

1. Stone Oak National Bank .

2. Stone Oak Bankshares, Inc.

3. International Bank of Commerce. [Subsequent to this suit being filed, International Bank of Commerce acquired Stone Oak Bank Shares, Inc. and Stone Oak National Bank. It is not a named party but has an interest in this litigation.]

4. Fidelity and Deposit Company of Maryland.

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Respondents, Stone Oak National Bank and Stone Oak Bankshares Inc. ("Stone Oak"), hereby oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENTS AND OPINIONS BELOW

Petitioner's appeal arises out of two decisions by the trial court, both of which were affirmed by the Fifth Circuit Court of Appeals. By order dated August 29, 1995, the trial court granted Stone Oak National Bank and Stone Oak Bankshares, Inc.'s Motion for Partial Summary Judgment. That order disposed of Petitioner's common law conspiracy claim. Subsequently, following a jury trial, the trial court entered judgment in Plaintiff's favor on his claim for unpaid criminal defense fees. The trial court, however, entered a take nothing judgment on Petitioner's oral employment contract claim. Both the summary judgment and the trial court's final judgment were affirmed by the Fifth Circuit Court of Appeals on May 19, 1997. The Fifth Circuit's opinion is attached to Petitioner's appendix as Exhibit A, the trial court's final judgment as Exhibit B and the trial court's order granting Stone Oak's Motion for Partial Summary Judgment as Exhibit G.

STATEMENT OF THE CASE

This is an employment case that turns on the application of Texas law to an alleged oral contract, and to a settlement agreement entered into between the Bank and various Federal Agencies in a civil forfeiture case. Despite this, Petitioner attempts to leave the impression that this case involves federal questions, and will impact federal officials. The reality, however, is that the only parties actually before the court are Petitioner and Respondents, Stone Oak National Bank, Stone Oak Bankshares, Inc. (collectively "Stone Oak"), and their liability insurance carrier, Fidelity & Deposit Company of

Maryland ("F&D"). There are no federal officials or governmental entities currently before the Court in this case. Furthermore, the only issues properly before this court are fact-specific employment questions that turn entirely on the law of the state of Texas. This Court's decision cannot affect any governmental agency or official, nor can it resolve any unanswered federal law questions. Indeed, it cannot even address any unanswered Texas State law questions.

Petitioner originally filed suit against Stone Oak, F&D, and several governmental officials, including the Secretary of the Treasury, Lloyd Benson, and Attorney General, Janet Reno. The trial court severed and dismissed Petitioner's claims against the governmental officials. Plaintiff appealed that order to the Fifth Circuit Court of Appeals, which affirmed the trial court in all respects. *Vander Zee v. Reno*, 73 F.3rd 1365 (5th Cir. 1996) (Vander Zee I). Petitioner did not appeal that decision to this Court.

Petitioner did, however, file a second suit against Stone Oak, F&D, and various governmental officials. The claims against Stone Oak and F&D were virtually identical to those still pending in the original action. The trial court again dismissed Petitioner's governmental claims, and consolidated his remaining claims into his original suit. Petitioner appealed the dismissal of his governmental claims to the Fifth Circuit, which again affirmed the trial court's decision in an unpublished opinion. *See Vander Zee v. Reno*, 100 F.3rd 952 (5th Cir. 1996) (unpublished opinion table) (Vander Zee II).

Petitioner proceeded with his claims against Stone Oak and F&D. Both defendants filed motions for summary judgement. The Court granted F&D's motion and dismissed all claims against it. The Court granted partial summary judgment to Stone Oak, dismissing Plaintiff's common law conspiracy claim, but allowing the breach of contract claims

to go forward. The jury found for Petitioner and awarded him $293,750.00 in contractual damages.

Petitioner's contract claim was based on two allegations: first, that Stone Oak was required to pay criminal defense fees he incurred in connection with money laundering. charges; second, that he had an oral contract to be reemployed following the conclusion of his money laundering indictment.

Following the jury trial, Stone Oak requested the court to enter a take nothing judgment on both claims. The court granted that motion, in part, entering judgment that Plaintiff recover $43,750.00 for criminal defense fees but otherwise holding that Plaintiff take nothing. Petitioner appealed that decision to the Fifth Circuit which, in an unpublished opinion, affirmed the trial court's judgment in all respects. *See Vander Zee v. Reno*, 116 F.3d 1477 (5th Cir. 1977) (unpublished opinion table) (Vander Zee III).

The evidence at trial established that Petitioner was employed by Stone Oak as a Vice-President. In that capacity he made several loans to a Mexican national, Mario Salinas. These loans were secured by Certificates of Deposits and real estate. Subsequently, Mr. Salinas was arrested on drug charges. Eventually, Petitioner and the Bank's President were also arrested on related money laundering charges. In connection with these arrests, Federal Officials also seized the assets securing the Salinas loans. That seizure resulted in the Bank being undercapitalized.

Petitioner alleged at trial that when he learned of his pending indictment he advised the Bank's Board of Directors. He alleged further that in response, the Bank's Chairman, Harold McDonald, said the Bank would stand behind him and would provide him with a job when his incident was resolved. McDonald's alleged statement was not reduced to writing,

confirmed by Board resolution, or otherwise ratified or adopted by the Bank.

Approximately two months later Petitioner was indicted for money laundering. In response, the Bank's Board passed a resolution requesting Petitioner's resignation. That resolution promised certain benefits, such as health insurance, but was silent as to the alleged reemployment promise. Petitioner did, upon request, tender his resignation.

The Government not only proceeded against Petitioner for money laundering charges, it also proceeded with its civil forfeiture case against the Bank. Had the Government succeeded in its forfeiture case, it almost certainly would have resulted in the Bank's closing. As it was, the pendency of that action and its effect on the Bank's financial status, almost brought the Bank down.

After Petitioner's acquittal on criminal charges, the Bank ultimately negotiated a settlement agreement with the Federal Government. That agreement was penned entirely by the Government and was presented as a "take it or leave it" proposition. The agreement allowed the Bank to regain part, but not all, of the previously seized collateral. It also required the Bank to raise additional capital, and prevented it from ever rehiring Petitioner. The Bank objected to this last provision, but to no avail. Faced with the choice of signing the agreement or closing the Bank, it reluctantly signed.

Even without the Bank's settlement agreement, financially it was unable to rehire Petitioner. The financial pressures caused by the Government's civil forfeiture proceeding placed Stone Oak in a financial crisis. Severe cost-cutting measures, including layoffs, were undertaken in all areas. When Petitioner was acquitted, Stone Oak neither needed, nor could it have afforded, another loan officer.

Interestingly, despite his allegations that the Bank had promised to rehire him, Petitioner never asked to return. Rather than attempt to enforce the oral contract he now claims existed, Petitioner chose instead to file the instant action.

REASONS FOR DENYING THE WRIT

The petition consists almost entirely of Petitioner's grievances against various governmental agencies and officials. References to Stone Oak and F&D are made almost in passing. Petitioner's criticism of the Government may have some therapeutic value, but because no federal governmental agency or official is a party to this appeal, the Court lacks jurisdiction to enter any relief against them. The remaining claims against Stone Oak and F&D are fact-specific and involve distinct questions of state law, which the trial court correctly decided. Petitioner's claims, therefore, do not justify this Court's involvement.

I. This Case Does Not Justify Supreme Court Review Because It Involves A Fact-Specific Analysis And Application Of Texas State Law.

With regard to Petitioner's state law claims against Stone Oak, he does not challenge Texas law on any constitutional or other federal ground. Rather, Petitioner challenges the trial court's application of Texas law, contending the trial court should not have dismissed his civil conspiracy claim and oral employment contract claim as a matter of law. The former would require this court to analyze Stone Oak's Motion for Summary Judgment and Petitioner's response, and then determine based upon those motions whether a fact issue was created. The latter would require this Court to examine the entire record and determine whether or not Petitioner introduced evidence of consideration in support of his oral contract and whether or not it violates the Texas Statute of

Frauds and Texas' at-will employment doctrine.

The resolution of neither issue is worthy of this court's consideration. Because both questions are fact-specific, it is doubtful this Court's decision would be of significant guidance to other courts in other cases. Even then, because both questions turn on an analysis and application of Texas state law, it is doubtful this Court's decision would have any impact outside the State of Texas.

Apparently recognizing that his claims against Stone Oak lack broad application, Petitioner claims in passing that a conflict exists between the Fifth Circuit and other circuits concerning the issues raised by this case. Petitioner, however, fails to cite a single case in support of that contention. He cannot do so because no conflict exists, and Petitioner's passing contention does not support this Court's involvement.

II. This Court Cannot Grant The Relief Petitioner Seeks Because No Federal Official Nor Federal Agency Is A Party To This Proceeding.

Petitioner makes clear that the real focus of his wrath is the Department of Justice and its attorneys. Petitioner alleges that the Department of Justice acted improperly by coercing the bank to enter into a draconian agreement, that the Department of Justice ruined his reputation and livelihood, and that the Department of Justice has perpetuated a fraud on the court.

In fact, many of the reasons advance by Petitioner for granting a writ of certiorari are focused directly on the Department of Justice and seek relief against it rather than

Stone Oak.[1] Regardless of how meritorious Petitioner's arguments are or how desirable it might be to address the alleged acts of misconduct by the Department of Justice and its attorneys, this case does not afford the opportunity to do so because no governmental agency nor official is a party to this appeal. Petitioner has previously filed two separate law suits against governmental officials such as Treasury Secretary Lloyd Benson, Attorney General Janet Reno, and the Assistant U.S. Attorneys he so strongly criticizes in his petition. In the original lawsuit, the governmental defendants filed a motion for dismissal. That motion was granted and those claims were severed. Petitioner filed an appeal to the Fifth Circuit Court of Appeals. That court affirmed the trial court's order of dismissal. *Vander Zee v.* Reno, 73 F.3d 1365 (5th Cir. 1996).

Petitioner then filed a second lawsuit against various governmental officials. In that suit, he raised the claims of conspiracy, improper action, etc. that are referenced in his petition. The governmental officials again filed a motion for dismissal which was granted by the trial court. Petitioner prosecuted a second appeal to the Fifth Circuit Court of

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[1] The full text of those are as follow: III. Under our system of justice, the Stone Oak Nation Bank (the Bank) acting with prosecuting attorneys of the United States Department of Justice violated clearly established principles of constitutional due process and liberty rights in conspiring and meting out extra-judicial punishment to the utterly innocent Petitioner: this court should exercise its supervisory power to correct a massive departure from standards of justice by the *United States Department of Justice*. IV. Substantial evidence, acquired only after dismissal of all charges against the government and its agents, under principals of Fifth Amendment due process and Fed. R. Civ. P. 60 (b), absolutely require the trial judge to reconsider the earlier "final dismissal" or, at the very least, to supplement the record of the *part of the case then on appeal* (emphasis in original).

Appeals. That Court, in an unpublished opinion, once again affirmed the trial court's order of dismissal.[2] Petitioner not appeal either Fifth Circuit decision. Those decision have, therefore, become final.

If Petitioner wished to challenge the dismissal of the governmental defendants, he should have appealed those prior Fifth Circuit decisions when this court had the jurisdiction to review them and to order appropriate relief. Waiting until now when they have become final, and attempting to obtain relief against the government when it is not a party to this action, is clearly improper. Essentially, what Petitioner is attempting to do is to collaterally attack the Fifth Circuit's decisions in Vander Zee I and Vander Zee II. This is improper and Petitioner's attempt should be rejected.

III. Supreme Court Review Of This Case Is Not Appropriate Because The Trial Court's Decisions Are Correct.

When stripped of its allegations against non-parties, Vander Zee's petition only identifies two causes of action against Stone Oak. Specifically, Vander Zee complains of the dismissal of his oral contract claim for want of consideration, and also the of dismissal of his civil conspiracy claim for want of a fact question. The trial court acted appropriately in both instances.

Petitioner alleges that in a board meeting, two months prior to his indictment and the bank's request for his resignation, that the bank's chairman promised that the bank would stand behind him and that it would reemploy him following his acquittal. The trial court correctly held that

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[2] *See Vander Zee v. Reno*, 100 F.3d 952 (5th Cir. 1996) (table of decisions without reported opinions).

regardless of the deference given to Petitioner when construing the chairman's comments, that as a matter of law those do not create a binding contract because there was no consideration for the alleged promise.

Petitioner was an at-will employee. Thus, under Texas law, Stone Oak had the absolute right to terminate his employment at any time, with or without cause, or to unilaterally change the terms of his employment absent an express agreement to the contrary. *Federal Express Corp. v. Dutschmann,* 846 S.W.2d 282, 283 (Tex. 1993). Oral contracts which are inconsistent with this proposition, such as oral contracts for lifetime employment are not enforceable unless reduced to writing. *See, e.g., Walmart Stores, Inc. v. Coward,* 829 S.W.2d 340, 342-43 (Tex. App. - Beaumont 1992, error den'd). The chairman's alleged oral statement was never reduced to writing. Thus, Vander Zee's claim fails as a matter of law.

Moreover, Vander Zee's claim fails because the alleged promise was a gratuitous promise and not supported by any consideration. In Texas, such gratuitous promises do not create enforceable contracts. *See Mason v. Babin*, 474 S.W.2d 809, 812 (Tex. Civ. App. - Waco 1971, writ ref'd n.r.e.) (a gratuitous promise, unsupported by consideration, does not create an enforceable contract). To overcome this requirement, Petitioner alludes to a statement made by Stone Oak's counsel during oral argument before the Fifth Circuit. That statement was taken out of context. The issue was whether or not Petitioner's resignation approximately two months after the chairman's alleged promise constituted consideration. During oral argument, counsel was asked if the bank benefited from Petitioner's resignation. The answer to this questions is yes. Banks depend upon public confidence. The presence of an officer under indictment is a

threat to that confidence. Thus, Petitioner's resignation benefited the bank. That resignation was not, however, consideration for the alleged promise made two months previously because the alleged promise was made without condition. Vander Zee does not allege the chairman said if you will resign, then we will pay your criminal defense fees, stand behind you and provide you with a job following your acquittal. Rather, Petitioner alleges the chairman made this promise without asking for anything in return. Vander Zee's resignation was not requested until some two months later. That request was made in the form of a Board of Directors resolution which did include promises such as health insurance coverage but did not include any promise of reemployment. The trial court, therefore, correctly held that Vander Zee's oral contract claim failed for want of consideration. The Fifth Circuit correctly affirmed that decision.

The trial court also correctly dismissed Petitioner's civil conspiracy claim. Initially, Petitioner asserted several conspiracy theories. Stone Oak filed a Motion for Summary Judgment which was granted, in part. The court dismissed Petitioner's statutory conspiracy claims but left pending his common law conspiracy claim. Following discovery and shortly before trial, Stone Oak filed a second Motion for Summary Judgement. The court granted that motion and dismissed the common law conspiracy claim. Vander Zee's petition attempts to leave this court with the impression that the trial court held that governmental officials can never be a co-conspirator in a civil conspiracy. This is incorrect. The trial court correctly recognized that in Texas before a person may be a co-conspirator, they must have committed an illegal act. The court found Petitioner had not established an illegal act by either the governmental officials or the Bank. The trial court's holding regarding the governmental officials is not

before this court because that finding has since become a final judgment. Thus, even if Vander Zee could produce some allegation of an illegal act by the Bank (an allegation he has never produced for either the trial court, the Fifth Circuit Court of Appeals or this Court), this would still be insufficient to save his cause of action in light of his failure to appeal the Fifth Circuit's prior determinations that the Government had no liability to Vander Zee.

CONCLUSION

Stone Oak respectfully submits that this Court should deny Vander Zee's petition for writ of certiorari. This case, when stripped of its superfluous allegations and reduced to the parties and claims which are actually before this Court, represents nothing more than the adjudication of individual rights under Texas state law. This case does not present issues which will likely impact other cases or other parties. It is, therefore, not worthy of this Court's involvement.

There is no doubt that Petitioner has been forced to suffer much because of actions taken by the Department of Justice. As regrettable as this situation may be, and as despicable as the Department of Justice's action may be characterized, this Court cannot address those wrongs in this case because no governmental official or agency is a party to this proceeding.

Finally, this Court's involvement is unwarranted because the trial court correctly dismissed Petitioner's oral contract claim and civil conspiracy claim. The oral contract claim was defeated by the lack of a written instrument and also the lack of consideration. The civil conspiracy claim was properly dismissed because Petitioner failed to establish an illegal act by either the Department of Justice or Stone Oak. To maintain a claim, it was incumbent upon him to establish illegal acts by both.

For the reasons stated above, Respondents respectfully pray that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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